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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1061

CHARLES L. MAEHREN et al.,
and JOHN R. CHURCH, et al.,
Petitioners,

v.

CITY OF SEATTLE, et al,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

CARROL, RINDAL, KENNEDY &
SCHUCK, P.S.

By James E. Kennedy and
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PETITION FOR WRIT OF CERTIORARI TO THE
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The petitioners, John R. Church, Jack G. Dial, Stuart G. Lorimer, Roger L. Ramsey, Edward J. Shaw, Charles L. Maehren, Richard J. Schneider, Steve J. Davidson, Rodric S. Mehus, Henry M. Cockerham, Dale T. Smith, Harold L. Jongkindt, Lewis N. Eyman, David W. Craig, Carter W. Hoffman, Keith E. Stevens, Clifford T. Myers, Dale L. Eberling, Paul H. Schneider, Stephen W. Olson, John O. Tennesen,

Robert J. Robillard, Michael D. Yager, Michael R. Heaton, James W. Maier, Gary L. Carlsen and Clyde F. Neaville, respectfully pray that Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington, entered in this proceeding on August 10, 1979.

OPINION BELOW

The opinion of the Supreme Court of the State of Washington reported at 92 Wn.2d 480, ___ P.2d _____ (1979) appears in the appendix hereto.

JURISDICTION

The opinion and decision of the Supreme Court of the State of Washington was entered on August 10, 1979. A timely Motion to Reconsider Decision Terminating Review was denied on October 8, 1979 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

The City of Seattle grants preference solely on the basis of race for Civil Service employment

and promotion. This preference is termed "Selective Certification". It is contrary to the provisions of the City Charter and contrary to the provisions of the City's collective bargaining agreement with the Firefighters Union. The Supreme Court of the State of Washington has ruled that the City has a compelling interest in granting such racial preference for the purpose of eliminating racial imbalance in its employment. The questions presented are:

1. Whether the 14th Amendment to the Constitution of the United States forbids such practices by governmental agencies.

2. Whether Title VII of the Civil Rights Act of 1964 as amended in 1972 either requires or permits such practices by governmental agencies.

3. Whether unchallenged proof that the persons given racial preference have never been victims of discrimination in their employment prevents the govermental agency from granting to

such persons a preference based on race for the purpose of reducing racial imbalance in employment.

4. Whether it is permissable to determine racial imbalance in employment by use of statistics from the geographical area served by the governmental agency rather than the geographical area from which the labor force is drawn.

CONSTITUTIONAL AND STATUTORY PROVISONS INVOLVED

The United States Constitution, Amendment 14, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any persons of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42

Section 2000e-2

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to

discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because or such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . .

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under

this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

. . . .

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section or other area, or in the available work force in any community, State, section, or other area.

STATEMENT OF THE CASE

This petition involves two cases which were consolidated for trial in state court. The Federal

question was first raised in Church, et al v. Seattle in the complaint for injunction. That case was consolidated with Maehren, et al v. Seattle for trial and the Federal question with respect to both the Fourteenth Amendment to the Constitution and Title VII of the Civil Rights Act was specifically raised in the pre-trial order as to both cases. Both questions were ruled upon by the trial court in its Conclusions of Law and both questions were specifically addressed and ruled upon by the Washington State Supreme Court (Appendix page 8).

Both cases below involve promotions within the Seattle Fire Department under Civil Service Rules required by the Seattle City Charter. One of the cases, referred to as the Maehren case, involves promotion to the position of Fire Lieutenant. The other case, referred to as the Church case, involves promotion to the position of Battalion Chief.

The Seattle City Charter, excluding language not here applicable, requires that promotions in

the Fire Department be made from the top 25% of persons on eligible lists established by competitive examination. All of the petitioners in this case are white males and were in the top 25% of their respective eligibility registers. The petitioners were passed over for promotion in favor of two Black males, one of whom placed in the lower 20% or number 22 out of 26 names on the register and the other placed in the lower 55% or number 52 out of 114 names on the eligible register.

Since 1964 the Seattle Fire Department has actively recruited members of minority races for employment in the Seattle Fire Department. In June, 1968 as part of the recruitment program the Seattle Fire Department began a salaried trainee program to prepare minority and disadvantaged persons to pass the Civil Service exams and the Fire Department recruit school. The trainee program was a continuous one although it was temporarily terminated in 1975 with the exhaustion of funds. At the time of trial the recruitment of minorities

had become so successful that the Chief Civil Service Examiner testified that the City could abandon the trainee program. The unchallenged evidence at the trial showed that the two Black firefighters given the racial preference in promotion had suffered no discrimination in employment in the Fire Department and, in fact, had progressed at a normal pace as compared with their white colleagues. From and after the time that the Civil Rights Act applied to municipalities [1972], all of the Seattle Fire Department examinations were content validated. Because of the size of the examination classes and the changing nature of the exams, it has not been feasible to use criterion related validation for the Fire Department examinations.

The trial court found that petitioners had presented a prima facie case of racial discrimination against them.

The City of Seattle and the state court justified the racially discriminatory preference in

promotion on the basis that there was a statistical imbalance by race in employment in the Seattle Fire Department. The City's statistical analysis, accepted by the court below, was based on the racial statistics of population within the geographical limits of the City of Seattle. By contrast the racial make-up of the geographical area from which the Fire Department work force is drawn, to wit, the Seattle-Everett Standard Metropolitan Statistical Area, shows the ratio of Black employees in the fire Department to be at or above their representation in that labor force. (The City of Seattle requires that applicants for employment, except for the Police and Fire Departments, be residents within the City limits. State law does not allow the City to place that restriction upon applicants for positions in the Fire and Police Departments. This accounts for the difference in the geographical labor market for the Seattle Fire Department as against the City as a whole.) The opinion below sought to justify the

racial discrimination in employment practices on the basis that the persons given a racial preference were both in the class of persons identified by Civil Service Rule as likely to have been victims of discrimination (Appendix page 29). This rationale ignores the fact that the proof by the petitioners showed clearly and unequivocably that the persons given a racial preference were not victims but had progressed in a normal fashion without discrimination. They entered employment at the average age level, their promotion was unaffected by any inservice credits, in addition they were provided the opportunity to accelerate their eligibility to be promoted by City funded educational programs and were tested only by validated examinations from the time the Civil Rights Act applied to municipalities.

To summarize, there is no evidence in this case of intentional racial discrimination other than the Selective Certification complained of by petitioners. All employment decisions from a

period prior to the effective date of the Civil Rights Act were non-discriminatory. The Seattle Fire Department has affirmatively, aggressively and effectively recruited, trained, qualified and employed members of the minority group in question since a time prior to the effective date of Title VII and the record affirmatively shows that the persons given a racial preference in this case have never been victims of racial discrimination in employment in the Seattle Fire Department. Further, the population statistics upon which the court below and the respondent City rely to justify their racial decision, is predicated upon an erroneous statistical basis.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decisions Of This Court On The Use Of Statistics To Establish Racial Discrimination Or Racial Imbalance In Employment

The court below stated the question as follows:

> The issue can be summarized as follows: in compiling statistics to determine whether racial imbalance exists in employment, should the relevant geographical area be determined by the entire Greater Metropolitan Area from which the Seattle Fire Department's labor force is drawn or resides, or should it be determined by the population residing within the geographical area wherein the City's work is performed and over which it has territorial jurisdicion?

(See Appendix pages 16-17)

The court below rejected petitioner's contention that determinations of racial imbalance in employment must be made by comparing the make-up of the actual work force with the labor market from which the work force is drawn. The court below instead determined that "law and logic" require that the comparison be made with the work force within the geographical limits wherein the work is to be performed (See Appendix page 19). The court below discussed various aspects of the quoted question and then answered it as follows:

> The record establishes that the majority of the City's employees reside in Seattle and the City draws most of its work force from

> Seattle. Therefore, the labor market used by the City to establish its base for the consideration of minority hiring (i.e., that area emcompassed by Seattle City Limits) was reasonable.

(See Appendix page 19).

This approach ignores the fact that the City of Seattle uses two labor markets. The City requires that applicants for employment, other than firemen and policemen be City residents. Washington State law prohibits such requirements for firemen and policemen and the labor market for those positions is thus expanded. RCW 41.08.075; 41.12.075. It would seem that logic dictates that a statistical computation of racial imbalance can only be made by considering the actual labor market in question.

The conclusion of the court below appears to be in direct conflict with the reasoning of this Court in Hazelwood School District v. United States, 433 U.S. 299, 52 L. Ed. 2d 768, 76 S. Ct. 2736 (1977).

The court below in this case and also in Lindsay v. Seattle, 86 Wn.2d 698, 548 P.2d 320 (1976) has upheld the use of racial preference in

employment until racial balance is achieved. Thus, assuming that Title VII and the Constitution permit racial preference to achieve such a result, the use of an erroneous statistical base will continue to create new victims among white males far beyond even such a permissible result.

2. The Opinion Of The Court Below Is In Conflict With Decisions Of This Court As To The Extent To Which Municipal Employers Can Utilize Racial Preference In Affirmative Action Programs

As pointed out in the statement of the case above, the undisputed and unchallenged evidence in this case established that the persons given the racial preference, had never been victims of racial discrimination in the Seattle Fire Department and had progressed normally with their contemporaries in the competitive examination process. There is no evidence to indicate any intentional discrimination against Blacks in this record and all Fire Department examinations since the Civil Rights

Act applied to municipalities have been content validated.

The court below characterizes selective certification as a "voluntary program" inferring kinship with United Steelworkers of America v. Weber, ____ U.S. ____, 61 L. Ed. 2d 480, 99 S. Ct. ____ (1979). The court below recognized that the voluntary agreement in Weber, supra was an agreement between the Union and a private employer. The court below likewise recognized that Weber, supra, involved a private rather than a public employer. (See Appendix at page 26) The lower court's opinion ignores the fact that Selective Certification is contrary to the Firefighter's Union agreement and is contrary to the provisions of the City Charter and in that sense is not voluntary.

The opinion below states that the program only allows the minorities in question to be considered for advancement and does not replace non-minority candidates with minority candidates. (See Appendix

at pages 27, 28) This statement is directly contrary to the City's own employment records in evidence as Exhibit 6 and Exhibit 9. Those exhibits show that for the two positions in question, only the minority candidates were certified as eligible for appointment and the candidates who should have been certified under the provisions of the City Charter were totally excluded from consideration for those appointments.

In upholding the racial preference granted in this case, the court below stated:

> It is sufficient that those benefited by selective certification are within a class of persons identified by Rule 7.03j as likely to have been the victims of discrimination.

(See Appendix page 29)

This holding is in conflict with the opinions of this Court in Franks v. Bowman Transportation Company, 424 U.S. 747, 47 L. Ed. 2d 444, 96 S. Ct. 1251 (1976); Teamsters v. United States, 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977); and Furnco Construction Corporation v. Waters, 438 U.S. 567, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978). From

the reasoning in those cases it would seem clear that an employer cannot create new victims of racial discrimination [the white males] unless it is necessary to make whole persons who had previously been victims of racial discrimination in employment.

The City in this case claimed a benign remedial purpose in its use of Selective Certification. The petitioners herein proved that the persons benefitted were not victims and thus could not be the subject of a remedial purpose and on this basis the petitioners asked to be considered for promotion on their merits rather than on the basis of race. The effect of the ruling in the court below is that white males cannot avoid victimization by proving that no remedial purpose is served in a particular case. This result is certainly antithetical to both the letter and the intent of Title VII and the Fourteenth Amendment to the Constitution of the United States and clearly is in conflict with the opinions of this Court cited above.

3. The Opinion Of The Court Below Is In Conflict With The Fourteenth Amendment To The United States Constitution

The petitioners herein urged to the court below that the racial discrimination in this case violated their right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. In construing the application of the Fourteenth Amendment to State action, this Court in Personnel Administrator of Mass. v. Feeney, ____ U.S. ____, 60 L. Ed. 2d 870, 99 S. Ct. ____ (1979) stated at 60 L. Ed. 2d 883:

> A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.

And at 60 L. Ed. 2d 884, the court stated :

> This Court's recent cases teach that such classifications must bear a "close and substantial relationship to important government objectives."

In the opinion below, the Washington Supreme Court stated:

> In light of the underrepresentation of minorities in the Seattle Fire Department as well as in City employment as a whole, and particularly considering the substantial underrepresentation in upper-level positions, we find the City's interest in employing Selective Certification to eliminate the racial imbalance in its employment to be compelling.

(See Appendix pages 14-15)

In the footnote to that quotation, the court below acknowledged that Justice Powell had questioned the quoted reasoning but cited Lindsay v. Seattle, 86 Wn.2nd 698, 548 P.2d 320 (1976). (See Appendix page 15) In the Lindsay opinion the court below held that Title VII of the Civil Rights Act required the City to use this type of racial preference in employment until it achieved a fair approximation of minority representation in City employment. This holding is in conflict with the ruling in Furnco Construction Corporation v. Waters supra and with Teamsters v. United States, supra. Thus, it would seem that racial imbalance in employment standing alone, as in this case, would fall far short of the "exceedingly persuasive

justification [needed] to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment." See Personnel Administrator of Mass. v. Feeney, supra at 60 L. Ed. 2d 884. As stated therein, the Fourteenth Amendment to the Constitution guarantees equal laws not equal results.

It is noteworthy that in Lindsay v. Seattle, supra, the court below specifically excluded the Constitutional question from consideration in holding that Title VII required that the City use racial preference to relieve racial imbalance. The Court below now cites Lindsay v. Seattle in support of a finding that achieving racial balance is a compelling state interest sufficient, even in the face of a constitutional challenge, to justify racial discrimination in its employment practices. This reasoning now provides authority for widespread use of racial discrimination in the employment practices of the various state and municipal employers in the State of Washington and would

appear to be in direct conflict with the pronouncements of this Court in interpretation of the Fourteenth Amendment to the United States Constitution.

CONCLUSTION

For these reasons, writ of certiorari should issue to review the judgment and opinion of the Washington State Supreme Court.

Respectfully submitted,

CARROL, RINDAL, KENNEDY & SCHUCK, P.S.

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January 3, 1980

APPENDIX

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

CHARLES L. MAEHREN, RICHARD J. SCHNEIDER, STEVE J. DAVIDSON, RODRIC S. MEHUS, HENRY M. COCKERHAM, DALE T. SMITH, HAROLD L. JONGKINDT, LEWIS N. EYMAN, DAVID W. CRAIG, CARTER W. HOFFMAN, KEITH E. STEVENS, CLIFFORD T MYERS, DALE L. EBERLING, PAUL H. SCHNEIDER, STEPHEN W. OLSON, JOHN O. TENNESEN, ROBERT J. ROBILLARD, MICHAEL D. YAGER, MICHAEL R. HEATON, JAMES W. MAIER, GARY L. CARLSEN and CLYDE F. NEAVILLE, Appellants, v. CITY OF SEATTLE, NOBIE CHAN, DONALD D. HALEY, ROBERT E. McGINTY, CIVIL SERVICE COMMISSIONERS, Respondents.	CONSOLIDATED UNDER No. 44975
JOHN R. CHURCH, JACK G. DIAL, STUART G. LORIMER, ROGER L. RAMSEY and EDWARD J. SHAW, Appellants, v. CITY OF SEATTLE, WES UHLMAN, Mayor, FRANK R. HANSON, Chief Seattle Fire Department, NOBIE CHAN, DONALD D. HALEY, ROBERT D. McGINTY, CIVIL SERVICE COMMISSIONERS, Respondents.	Filed: Aug. 10, 1979

STAFFORD, J.--Appellants, employees of Seattle Fire Department, seek review of a trial court decision upholding the the Affirmative Action Program used by the Fire Department and the City of Seattle in the hiring and promotion of personnel. We affirm the trial court.

At the outset we emphasize that this case does not involve a loss of acquired seniority rights, the displacement of non-minority employees by minority employees, or the downgrading of non-minority employees to favor minority employees. Further, the case does not involve the promotion of non-qualified minority employees in place of qualified non-minority personnel. All personnel, both minority and non-minority, have successfully completed the civil service examinations. The name of each man has been advanced to the civil service register as eligible for promotion to the positions in question. In short, this case involves promotion to vacant positions within the Fire Department.

The factual background of the case as evidenced by the pre-trial order, the extensive testimony and documents produced at trial, and the findings of the trial court upheld below can be summarized as follows. Pursuant to a 1972 amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the City of Seattle is under a duty to refrain from engaging in racial discrimination in employment and to take affirmative action to eliminate the effects of past discrimination. A similar duty is mandated by Federal Executive Order 11246, Revised Order 4 of the United States Department of Labor's Office of Federal Contract Compliance, and RCW 49.60, all of which apply to the City. Recognizing this duty, the Mayor of Seattle issued an executive order in August 1972 establishing an affirmative action program for all departments of the City. The stated goal of this program was to increase the

number of minorities, women, and persons over 40 years of age employed by the City to correspond with their statistical composition within the available work force of the City's population. The Mayor's Executive Order recognized that the condition of underrepresentation of such persons was "caused by present or past practices, customs or circumstances that have limited employment opportunities for members of the affected group." By Resolution 23849 and Ordinance 101548, adopted in October 1972, the Seattle City Council affirmed the Mayor's Executive Order and mandated the creation of affirmative action programs by all city departments.

The City's Affirmative Action Program was adopted in May 1973. The Seattle Fire Department had adopted an Affirmative Action Program in September 1972. That program subsequently was revised by the Fire Department and approved by the Seattle Human Rights Commission in September 1976.

Both the City's and the Fire Department's programs approve the use of "selective certification" as a method of increasing minority representation in employment. Article 16, of the Seattle City Charter, establishes the basic method by which the Seattle Civil Service Commission is to certify eligible candidates for possible employment by the City. Initially a department head notifies the Commission of a vacancy. The Commission certifies either the top five eligible candidates, that is, those who have passed the civil service examination, or the top 25 percent of the eligible candidates, whichever is the greater. City Charter, Art. 16 § 9. Pursuant to rule making power created by Article 16 the Commission promulgated Rule 7.03j providing for selective certification. Since 1971 the selective certification procedure has been available as an alternative method for certifying the highest ranking elibible minority candidates on the register not otherwise certifiable under regular procedures. Selective

certification is used to implement the City's Affirmative Action Program when necessary to achieve increased representation of minority, female or handicapped employees. Such certification of a minority person may be requested by a department head and must be approved by the director of the Department of Human Rights and the Civil Service Commission. The rule allows selective certification only from the list of those eligible for the vacant position, that is, only those who have successfully passed the civil service examination. Further, only the highest ranking eligibles of a particular minority may be certified. Selective certification does not assure that a minority employee will be appointed to the position. Rather it assures that an eligible minority employee will be represented in the final pool of candidates from which the department head appoints. Selective certification is available to fill both entry-level and promotional vacancies.

In 1974, certain of the appellants took and pased a promotional examination for the Fire Battalion Chief administered by the Civil Service Commission. These appellants are caucasian employees of the Fire Department. Each placed within the top quartile on the eligibility register and thus was eligible to be certified under regular procedures for the position of Fire Battalion Chief. Claude Harris, a black employee of the Fire Department, also took and passed the promotion examination for Fire Battalion Chief and was place on the eligibility register. However, he did not place within the top quartile.

In 1976 three Fire Battalion Chief positions became available and the Fire Chief made a request for certification to fill these positions. No request was made for selective certification. Subsequently, the Commission made a regular certification of employees from the register which included appellants' names and also made a selective certification of Claude Harris, the only

minority employee on the eligibility register. The Fire Chief appointed two persons from the regular certification and Claude Harris from the selective certification as Fire Battalion Chiefs.

The remainder of the appelants also are caucasian employees of the Fire Department. In 1974 each took and passed a civil service promotional examination for the position of Fire Lieutenant. Each placed in the top 25 percent of the eligibility register. Donald Taylor, a black employee of the fire Department, took and passed the examination. Although he achieved the eligibility register, he did not place in the top quartile. Between November 1973 and May 1975, 14 Fire Lieutenant positions became available in the Fire Department. The Fire Chief filed requests for certification, one of which was a request for selective certification of an eligible racial minority employee. Appellants were among those certified under the regular procedure. One selective certification was made containing Taylor's name, the only minority employee on the eligibility register. Thirteen caucasians and Taylor were appointed to these positions.

Those persons certified under the regular certification procedures but who were not appointed as Fire Battalion Chiefs filed suit challenging the selective certification procedures as violative of both Title VII of the Civil Rights Act of 1964, as amended, and the equal protection quarantees of the federal and state constitutions. Those who were certified but not appointed as Fire Lieutenants filed a similar suit. Both groups also challenged the selective certifications of Harris and Taylor as invalid for failure to comply with the procedures required by Rule 7.03j. Because they present the same issues, the two suits were consolidated for trial. The trial court upheld the statutory anc onstitutional validity of selective certification and the procedural validity of Taylor

and Harris's certifications. Appellants obtained direct review of the trial court's decision by this court pursuant to RAP 4.2.

The preliminary issues raised by appellants are evidentiary in nature. Appellants challenge a number of findings of fact made by the trial court as either lacking in substantial evidentiary support or as overbroad and misleading. We do not agree with these challenges and affirm the trial court.

When findings of fact are challenged, our consideration is limited to whether there is sufficient evidence to support them. If such support is established, the findings will not be distrubed on appeal. Culinary Workers Union v. Gateway Cafe, Inc., 91 Wn.2d 353, 588 P.2d 1334 (1979); Seattle-First Nat'l Bk v. Brommers, 89 Wn.2d 190, 570 P.2d 1035 (1977). In reviewing the evidence, we will not substitute our judgment for that of the trial court. Lantis v. Pfarr, 67 Wn.2d 994, 410 P.2d 900 (1966).

The trial court found:

> On October 20, 1971, the Seattle Civil Service Commission, by resolution, promulgated Civil Service Rule 7.03j which provides for selective certification of eligibles from any register other than in the normal order when necessary to implement the Affirmative Action Program of the City of Seattle to achieve ratios of minority, female or handicapped employees in all City classifications equal to their ratio in the Seattle community.

(Finding of Fact 7.) Appellants do not contend this finding lacks substantial evidentiary support. Rather they argue it is misleading in failing to make clear that Rule 7.03j requires that reasons be given to justify selective certification and that

requests for selective certification must specify a certain race. The finding is an accurate summary of the rule.. A trial court is not required to articulate every facet of a rule's operation when making a general finding on its effect.

The trial court also found:

> On August 25, 1972, the Mayor of the City of Seattle issued an executive order establishing an affirmative action program in the City of Seattle and all of its departments to correct a condition of underrepresentation of minorities and females in City employment then existing and recognized as caused by a variety of employment practices in the City which had operated to discriminate against such groups in the past and deny them employment opportunities; said order authorized the use of selective certification to this end.

(Finding of Fact 8.) Appellants claim this finding is not supported by the evidence and is misleading because it generalizes with respect to all City employment and implies that undesirable conditions existing in other city departments also exist in the Fire Department. We note first that the finding is a correct description of the Mayor's order, which is all it purports to be. We will discuss later the substantial evidence presented at trial to support the existence of a condition of underrepresentation in City employment in general and in the Fire Department in particular at the time the selective certifications challenged here were accomplished.

Appellants further appeal the rufusal of the trial court to enter their proposed findings. A trial court is not required to make findings of fact on all matters about which there is evidence in the record. Only those findings which establish the existence or non-existence of determinative

factual matters need be made. Schoonover v. Carpet World, Inc., 91 Wn.2d 173, 588 P.2d 729 (1978); Bowman v. Webster, 42 Wn.2d 129, 253 P.2d 934 (1953). It was not error to refuse appellants' proposed findings.

Finally, appellants assign error to the trial court's refusal to admit certain offered exhibits. The admission or refusal of evidence lies largely within the sound discretion of the trial court. We will reverse a trial court only upon a showing that it abused that discretion. Goodell v. ITT-Federal Support Serv's, Inc., 89 Wn.2d 488, 573 P.2d 1292 (1978). Two of the proffered exhibits were repetitious of earlier testimony and thus properly excluded as superfluous. The other two exhibits violate the hearsay rule and were proerly refused.

The remainder of appellants challenges involve four general issues: (I) does the Affirmative Action Program employed by the City and the Seattle Fire Department viloate Title VII of the Civil Rights Act or the equal protection guaranties of the federal and state constitutions?; (II) is there a condition of underrepresentation of minorities in City and Fire Department employment sufficient to support the remedial provsions of the Affirmative Action Program?; (III) if a condition of underrepresentation sufficient to allow racial preference in promotional opportunity exists, can such preference be given to persons who have not suffered individual acts of discrimination?; and (IV) were the procedures used in selectively certifying Claude Harris and Donald Taylor valid?

I
ARE TITLE VII OR EQUAL PROTECTION VIOLATED?
A. TITLE VII

The precise question of whether the selective certification procedure employed by Seattle's

Affirmative Action Program violates Title VII of the Civil Rights Act was answered by this court in Lindsay v. Seattle, 86 Wn.2d 698, 548 P.2d 320 (1976). In Lindsay we held that Title VII permitted affirmative action where necessary to eliminate the continuing effects of past discrimination.

The statistical information presented to the trial court in Lindsay indicated the City's prior employee selection procedures had created a substantially disproportionate level of minority representation in public employment over a period of years. This statistical evidence raised an inference that the racial imbalance resulted from discriminatory employment practices. The evidence also indicated the effects of past discrimination tended to perpetuate themselves, i.e., the inequalities resulting from past discrimination made new employment opportunities less accessible to minorities. Recognizing the effect of past discrimination in City hiring we held:

> The fact that the City voluntarily has sought to achieve equality of employment opportunity in the public sphere rather than by court order does not detract from or lessen the legal validity and necessity of its affirmative action program under title 7. Voluntary compliance, rather than court ordered relief, is the congressionally preferred method of achieving equality of employment opportunity.
>
> Selective certification . . . is not only appropriate, but also essential to eradicate in the instant case the present effects of past discrimination.

Lindsay v. Seattle, supra at 706.

Appellants contend that our holding in Lindsay should not be determinative of their Title VII challenge in light of later United States

Supreme Court cases. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978); International Bhd. of Teamsters v. United States, 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977). Appellants' position is not well taken.

The cases cited by appellants involve either private or government-initiated actions against employers for racially discriminatory hiring practices in violation of Title VII. Although the Court reached different results as to the discrimination claims, in each case, it stated in dicta that Title VII did not require hiring procedures that maximized the hiring of minority employees nor did it require that the work force mirror the racial makeup of the general population. Furnco, 438 U.S. at 577-78; Teamsters, 431 U.S. at 340. As we made clear in Lindsay, Seattle volutarily established its affirmative action programs. Thus, while the above cited cases reflect the United States Supreme Court's consideration of precisely what remedial efforts are mandated by Title VII, they do not purport to nor should they be read to limit those voluntary remedial efforts permitted by Title VII. In the absence of a compelling reason to overturn it, we hold Lindsay controls as to appellants' Title VII and claim and on this issue the trial court is affirmed.

B. EQUAL PROTECTION

Appellants challenge the City's selective certification procedure as violating the equal protection guarantees of the federal and state constitutions.[1] The equal protection issue was not preserved for appeal in Lindsay.

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[1] U.S. Const. amend 14, § 1 reads in pertinent part:
"nor shall any state deprive any person of life,

In an equal protection challenge, a necessary initial determination is the proper level of judicial scrutiny applicable to the challenged classification. The task is particularly difficult, where, as here, "reverse discrimination" is charged. Although this issue recently was raised in University of Cal. Regents v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978), a majority of the Court failed to agree on the appropriate constitutional standard of review where affirmative action programs are challenged. Justices Powell and White would hold that racial or ethnic distinctions of any kind are inherently suspect and call for the "most exacting judicial examination". Bakke, 438 U.S. at 291. Justices Brennan, Marshall and Blackmun, dissenting, opined that "racial classifications designed to further remedial purposes must serve important governmental objectives and must be substantially related to the achievement of those objectives". Bakke, 438 U.S. at 359.[2] In the instant case it is not necessary to decide which among these standards is the more appropriate since we hold the selective

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Footnote [1] continued.
liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Art. 1, § 12 of the Washington Constitution states:

"No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

The state clause is given the same general interpetation as the federal clause. Hanson v. Hutt, 83 Wn.2d 195, 517 P.2d 599 (1973); Defunis v. Odegaard, 82 Wn.2d 11, 507 P.2d 1169 (1973).

[2] The remaining members of the Court did not reach the equal protection issue instead invalidating the University's admission standards as violative of Title VI.

certification procedure survives the constitutional challenge under both standards.

In DeFunis v. Odegaard, 82 Wn.2d 11, 507 P.2d 1169 (1973), the admissions program of the University of Washington Law School was unsuccessfully challenged as violative of equal protection. We held therein that the "burden is upon the law school to show that its consideration of race in admitting students is necessary to the accomplishment of a compelling state interest". DeFunis, 82 Wn.2d at 32. We recently applied the same standard in McDonald v. Hogness, Wn.2d , P.2d (1979), to uphold the admissions program of the University of Washington medical school against a similar equal protection challenge. The vitality of the standard enunciated in DeFunis has not been diminished by Bakke. Here, too, the City has the burden of demonstrating that the selective certification procedures used by the City and its departments are necessary to the accomplishment of a compelling governmental interest.

The trial court found:

> In 1964, minorities were grossly underrepresented in employment within the Seattle Fire Department in relation to their composition within the available City work force. In 1972, 1974 and 1976 they continued to be substantially underrepresented within that department in relation to the minority work force in the City. Minorities are also underrepresented in job classes after entry. In 1976 there were still no minorities employed in the 30 official and administerial positions within the Fire Department and only 8 employed as Fire Captains or Fire Lieutenants out of a total of 155 such positions.

(Finding of Fact 15.) The trial court further found that the City's past employee selection

processes had discriminated again minority applicants, the effects of which were continuing and that such discrimination affected hiring and promotion of uniformed personnel within the Seattle Fire Department. (Finding of Fact 16.)

Our review of the record indicated that these findings are thoroughly supported by fact. In 1965, 7 percent of the City's employees were minorities[3] while minorities represented only 0.3 percent of the Seattle Fire Department personnel.[4] There is no evidence in the record as to the percentage of minorities in the available work force at that time. In 1970 minorities represented 8.1 percent of the City's employees and 3.2 percent of the Fire Department's employees.[5] In that year, minorities represented 13.5 percent of the available work force.[6] By 1975, 15.2 percent of City employees and 8.6 percent of Fire Department employees were minorities.[7] Minorities represented 15.8 percent of the available work force in

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[3] Minority as used in the statistics included all non-caucasian races. Caucasian females were not included as a minority group in the calculations.

[4] Minority Employment Charts, 1965-1969, Seattle Human Rights Department Compilation, Exhibit No. 44.

[5] Minority Employment Charts, 1970, Seattle Human Rights Department Compilation, Exhibit No. 44.

[6] Puget Sound Prospectus No. 3, Affirmative Action, Chamber of Commerce, Exhibit No. 44.

[7] Race and Sex Summaries by Category and Department in City Employment, 1972-76, Exhibit No. 44.

that year.[8] These figures provide graphic factual support for the trial court's finding of underrepresentation of minorities in particular job classifications.[9] These latter figures render less meaningful the overall appearance of minority employment in the City and the Department. In City employment as a whole and particularly in the Seattle Fire Department, minorities are substantially underrepresented in supervisory and administrative classifications.

In light of the underrepresentation of minorities in the Seattle Fire Department as well as in City employment as a whole, and particularly considering the substantial underrepresentation in

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[8] Washington State Employment Security Department, Labor Market Analysis, Suppl. to Manpower Information for Affirmative Action Programs, 1974-75, exhibit No. 44

[9] Summary by Job Category - % of Minority.

		Officials & Managers	Professionals* Supervisors/ Analysts	Technicians (Training)	Office & Clerical (Secretaries & Clerks)	Protective Services (Capt., Lt., Firemen)	Craftsman	Para-Professionals (Aides)
1972	City	6.9	13.6	15.0	12.8	10.7	7.0	--
	SFD	-0-	-0-	-0-	10.0	6.3	8	100
1973	City	8.1	13.2	24.8	14.0	7.2	8.9	29.8
	SFD	-0-	-0-	-0-	5.6	7.6	-0-	50
1974	City	8.2	13.1	13.5	13.8	7.4	9.8	16.3
	SFD	-0-	-0-	-0-	5.2	8.0	-0-	-0-
1975	City	7.8	14.9	14.9	15.6	14.2	10.5	25.9
	SFD	-0-	-0-	-0-	15.0	8.8	-0-	-0-
1976	City	7.6	14.0	15.6	17.5	8.8	11.7	27.5
	SFD	-0-	-0-	-0-	18.2	9.6	-0-	-0-

Source: Computer Printout of Seattle Race & Sex Summaries by Categories & Departments - 1972-1976
Composite of Exhibits 45 and 46

upper-level positions, we find the City's interest in employing selective certification to eliminate the racial imbalance in its employment to be compelling.[10] The fact that minorities participate on an equal basis in the tax support of the City further supports this conclusion. DeFunis v. Odegaard, supra at 33.

We hold that the selective certification procedure violates neither the equal protection clause of the fourteenth amendment to the United States Constitution nor article 1, section 12 of the Washington State Constitution. We affirm the trial court on this issue.

II
CONDITON OF UNDERREPRESENTATION

Having determined that selective certification is both constitutionally and statutorily valid, we now turn to the remaining issues raised by appellants. We made clear in Lindsay that the

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[10] In his opinion in University of Cal. Regents v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), Justice Powell suggests that a government interest in remedying the effects of past discrimination cannot be a compelling justification for an affirmative action program absent "judicial, legislative or administrative findings of consitituional or statutory violations." Bakke, 438 U.S. at 307. While recognizing that a majority of the Court did not join in this suggestion, we note that the Equal Employment Opportunity Commission formally charged the City of Seattle with violating Title VII in 1973. In addition, both the trial court and this court found the City in violation of title VII in Lindsay v. Seattle, 86 Wn.2d 698, 548 P.2d 320 (1976).

"basis and rationale for affirmative relief will disappear when the vestiges of past discriminatory effects substantially are eliminated." Lindsay v. Seattle, supra at 707. (Italics ours.) Appellants suggest a number of reasons why the trial court erred in holding that the effects of past discrimination have not been substantially eliminated.

Appellants first contend there has not been a pattern or practice of racial discrinimation in the hiring and promotion policies of the Fire Department, whatever the effect of City hiring policies on City employment, as a whole, may have been. The trial court found:

> The City of Seattle's employee selection processes in the past have discriminated against minority applicants, the effects of which are continuing. That discrimination affected hiring and promotion of uniformed personnel within the Seattle Fire Department.

(Finding of Fact 16.) Appellants claim this finding is not supported by substantial evidence. However, statistical evidence in the record, some of which is set forth above and in footnote [9], establishes that minorities have been substantially underrepresented in the Fire Department and that this underrepresentation is particularly evident at the supervisory level. There is substantial evidentiary support for the trial court's finding.

Appellants' next contention involves the statistical base employed by the City, and by the trial court, to determine that a racial imbalance existed in the work force of the City and Fire Department. The issue can be summarized as follows: in compiling statistics to determine whether racial imbalance exists in employment, should the relevant geographic area be determined by the

entire greater metropolitan area from which the Seattle Fire Department's labor force is drawn or resides, or should it be determined by the population residing within the geographical area wherein the City's work is performed and over which it has territorial jurisdiction?

In designing and evaluating its Affirmative Action Program the City used the geographic boundaries of Seattle to define the relevant labor market. The trial court found use of this labor market to evaluate the racial composition of the City's work force was reasonably and rationally related to the City's function and territorial jurisdiction. (Finding of Fact 25.) Appellants assigned error to this finding contending that a more appropriate labor market would have been that area from which the Fire Department's employees are drawn as evidenced by their current places of residence. According to them, the relevant area should be the entire Seattle-Everett Standard Metropolitan Statistical Area.

Statistics can provide evidentiary support for an allegation of a pattern or practice of discrimination under Title VII. International Bhd. of Teamsters v. United States, 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977). In fact, where gross statistical disparities can be shown, they alone, in a proper case may constitute prima facie proof of discrimination. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 53 L. Ed. 2d 768, 97 S. Ct. 2736 (1977). Where, as here, a demographic statistical method is used, a pattern of discrimination may be inferred from the statistical disparity between the work force and the general public. However, the validity of such an inference depends upon whether the geographic area coincides with the relevant labor market in a particular case. therefore, a determination of whether minority group members are proportionately represented in an

employer's work force initially requires an identification of the appropriate population to be used as a base.

As important as this determination is, courts have yet to express workable guidelines for the selection of the appropriate population from which the statistics are to be derived. Several courts have assumed the relevant labor market is either the city from which an employer draws its workers or the city within which it does business. Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); United States v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied 404 U.S. 984 (1971). Another court has held that in comparing the percentage of minorities in a labor pool with the percentage in a union, the appropriate geographic area to be used is the area from which the union draws its members rather than the area encompassed by the union work jurisdiction. Equal Employment Opportunity Comm'n v. Local 14, Int'l Union of Op. Eng., 553 F.2d 251 (2nd Cir. 1977). The United States Supreme Court Also has suggested that, in certain cases, the appropriate labor market for comparison would be that area from which the specifically educated and trained labor was drawn. Hazelwood Sch. Dist. v. United States, supra. However, the Court did not designate the labor market or area it considered relevant. That was left to the trial court for later determination. At best the combined effect of these cases appears to require that the focus be relevant to the issue at hand whether it involves employment tests, physical requirements, the prior training or education or employees being hired and compared, or the areas being compared, as the areas being compared.

In the instant case it is not necessary to decide which of the above approaches is correct. Although appellants contend that in considering the

geographical area of the labor pool, the Seattle Fire Department, rather than the City of Seattle, should be the statistical focus, we do not agree. Based upon both law and logic, we hold the City, not the Fire Department, is the appropriate focus. An unchallenged finding of the trial court establishes that the City is the actual employer of the appellants. Title VII, Executive Order 11246 and Labor Department Revised Order 4, and RCW 49.60 place a duty on the city to end discriminatory hiring practices. The Fire Department is not an independent entity separate from the City of Seattle--rather it is a creature of that municipality. See Charter of the City of Seattle, article 3, section. 2. The record reveals that the geographic limits of the City are used by the Seattle Human Rights Department as the comparative market for all the affirmative action plans for Seattle and that all City departments are subject to the same analysis. This area was chosen on the basis of a number of factors including transportation, housing, police protection and residence requirements. It would be unrealistic to require the City to calculate an appropriate labor area for each of its departments based upon the changing residences of the employees within a department. The record establishes that the majority of the City's employees reside in Seattle and the City draws most of its work force from Seattle. Therefore, the labor market used by the City to establish its base for the consideration of minority hiring (i.e., that area encompassed by Seattle city limits) was reasonable. It is also of interest to note that even if we were to adopt appellants' broader concept of "relevant work force" the statistics at hand still demonstrate that minority employees are substantially underrepresented in upper positions within the Seattle Fire Department. In the final analysis these are the positions with which we are primarily concerned in this case. We affirm the trial court on this issue.

Appellants finally contend any statistical evidence of racial discrimination is rebutted by showing that examination and selection procedures for promotion are based on civil Service Merit Examinations which have been "validated" as that term is used by the Equal Employment Opportunity Commission (EEOC). This, however, presents only a mnor part of the picture. The examinations in question were not fully validated. Rather they were only "content" validated by the EEOC subsequent to 1971. It is stipulated that prior to that time none of the civil service examinations had been validated in any way. Further, the trial court found, and there is substantial evidentiary support that:

> Civil Service examinations including Fire Department related exams continue to adversely impact minority candidates for appointment, inasmuch as such candidates continue to have a greater failure rate and place on the lower ends of the registers when they pass. Although the City now employs the "content" validation Method on its tests, it appears such validation is often inadequate or suspect, is capable of bias, has been challenged by the Equal Employment Opportunity Commission and is sought to be improved by the City to the end of making these tests truly job related and color blind.

(Finding of Fact 17.)

The requirements for test validation are set forth in EEOC guidelines and are now firmly established in the law of employment testing. 29 C.F.R. 1607.4-.9; Albermarle Paper Co. v. Moody, 422 U.S. 405, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975). "Validation" is a term of art for the process of determining the "job relatedness" of a selection procedure. There are three methods of validating

employment tests: "content" validation which was employed here, "construct" validation, and "criterion" validation.[11] Criterion differs from "content" and "construct" validation in that the former examines not only the content of the test but the relationship between test success and job performance. The EEOC considers "Criterion" validation the most accurate and courts have recognized it as the best method of establishing job-relatedness. EEOC Decision No. 73-0499 (1973); Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 19739; Boston Chapter, N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied 421 U.S. 910 (1975). In fact, the EEOC allows "content" and "construct" validation only when "criterion" validation is not feasible. 29 C.F.R. 1607.5. The trial court's critical characterization of the "content" validation is accurate.

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[11] "Content" validity is established if the content of the test closely duplicates the actual duties to be performed by the applicant. "Construct" validation requires identification of general mental and psychological traits believed necessary to successful job performance and fashioning a qualifying examination to test for the presence of those traits. "Criterion" validation (also known as predictive validation) involves identifying criteria that indicate successful job performance and matching test scores with successful job performance ratings for the criteria to determine whether the applicant who receives high scores performs as predicted. Washington v. Davis, 426 U.S. 229, 247, n. 13, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1975).

Employment selection and promotion procedures are subject to scrutiny under Title VII if they result in substantially higher failure rates among protected applicants. A prima facie violation can be established by showing such a disproportionate impact on a protected class. Dothard v. Rawlinson, 433 U.S. 321, 53 L. Ed. 2d 786, 97 S. Ct. 2720 (1977); Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977). The burden then shifts to the employer to demonstrate that the test is a valid predictor of job performance. Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971); Davis v. County of Los Angeles, supra. Nevertheless, appellants appear to contend that once a test has been "content" validated there can be no evidence of racial discrimination. The EEOC in its guidelines for employee selection and promotion does not suggest that the validation of tests alone negates the possibility of discriminatory practices.

> Nothing in these guidelines shall be interpreted as diminishing a person's obligation under both title VII and Executive Order 11246 as amended by Executive Order 11375 to undertake affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin. Specifically, the use of tests which have been validated . . . does not relieve employers . . . of their obligations to take positive action in affording employment and training to members of classes protected by title VII.

29 C.F.R. 1607.14 (1978) (Italics ours.) Fully consistent with the foregoing EEOC guidelines, the trial court did not absolve the City of its duty merely because the tests had been "content" validated.

The trial court was quite correct in avoiding a suggestion that the tests administered by the commission, whether or not adequately validated, were solely responsible for the Department's condition of minority underrepresentation. Rather, it found and the record clearly supports the fact that racial imbalance within the Fire Department may have resulted from a variety of selection procedures only one of which was testing.

> Other employment practices within the City continue to operate to the disadvantage of minority caindidates for promotional opportunities within the Seattle Fire Department and tend to freeze the status quo, in particular the requirement for long years of service at lower grades to be eligible for promotional exams and the addition of service credits to certain candidate's tests scores relating to the number of years those candidates have been employed by the City.

(Finding of Fact 18.) Prospective employees of the Fire Department, in addition to passing the civil service examination, must pass a background and medical check, meet certain educational requirements and successfully complete recruit school. Testimony indicated that minorities traditionally have not fared as well as caucasians in these areas. In the Department's promotional procedures, in-service credits clearly improved the competitive positions of candidates for promotion.[12] Because

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[12] Regularly appointed employees who receive a passing grade on a promotional examination have in-service credits added to their grade. Credit is given for a maximum of 20 years' extra service with a maximum of 10 points computed in the following manner.

of the substantial underrepresentation of minorities in the past, these credits negatively impact on the relative positions of minorities competing for promotional opportunities.

The trial court found that article 16, section 9 of the Seattle City Charter, which defines the regular certification procedures, has the effect of impeding and frustrating the employment opportunities of minorities within the Fire Department. (Finding of Fact 20.) Appellants suggest this finding is contrary to the evidence because the trial court had facts before it indicating minorities were achieving passing rates on the promotional examinations roughly equal to the rate of non-minorities. Actually there is conflicting evidence on this point. Where the trial judge is presented with conflicting evidence, we will not disturb his finding based upon the evidence. Jacobs v. Brock, 73 Wn.2d 234, 437 P.2d 920 (1968); King Logging Co. v. Scalzo, 16 Wn. App. 918, 561 P.2d 206 (1977). Moreover, the appropriate focus under article 16, section 9 is not the passage rate but the top quartile or top five persons among those who successfully pass the examination. The record supports the trial court's finding as it relates to minority placement in the top 25 percent of eligible candidates. The trial court is affirmed on this issue.

Footnote [12] continued.

(1) 1 point for each full year for the first 4 years of service in excess of the minimum service specified for entrance to the examination;

(2) 1/2 point for each full year of the next 8 years of service;

(3) 1/4 point for each additional full year of service.

III
ACTUAL VICTIMIZATION

The trial court held:

> The persons benefitted by affirmative action of the City to integrate its work force need not prove they themselves have been discriminated against in the employment process.

Conclusion of Law 11. Appellants assign error to this holding, claiming the selective certification here employed was invalid because neither Harris nor Taylor were shown to have suffered any act of individual discrimination. They contend that a determination of actual victimization is a prerequisite for the use of a racial preference in the form of selective certification. As primary support for this contention appellants cite Weber v. Kaiser Alum. & Chem. Corp., 563 F.2d 216 (5th Cir. 1977). Subsequent to oral argument in the instant case, the United States Supreme Court reversed the decision of the Circuit Court thereby considerably weakening appellant's contention. United Steelworkers of America v. Weber, ____ U.S. ____, ___ L. E. 2d ____, ____ S. Ct. ___, slip opinion, June 27, 1979.

Weber arose from a collective bargaining agreement covering terms and conditions of employment at numerous Kaiser Aluminum plants. The agreement included an affirmative action plan under which Kaiser and the United Steelworkers union were to admit minorities into on-the-job training programs on a one-to-one ratio with whites until the percentage of minority craft workers roughly approximated the percentage of minorities in the relevant labor force. To accomplish such minority representation, seniority lists for both whites and minorities were established and admission to the program was made on a one-to-one ratio from the

separate lists. As a result, minority employees were admitted to the training programs ahead of white employees with greater seniority.

Weber, a white employee at one of the plants, brought a class action under Title VII challenging the dual seniority system. The District Court found the system constituted unlawful reverse discrimination and enjoined the use of quotas at that plant. On appeal, the Fifth Circuit affirmed and held that Title VII permits the use of racial quotas only as a make-whole remedy for victims of the employers' past discrimination. Weber v. Kaiser Alum. & Chem. Corp., supra at 226.

In reversing, the Supreme Court identified the only question presented by Weber as:

> the narrow statutory issue of whether Title VII forbids private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the [challenged] plan.

United Steelworkers of America v. Weber, supra, slip opinion at 5. The court held Title VII did not prohibit all private, voluntary, race-conscious affirmative action plans, including the plan there challenged. Throughout the opinion, the Court emphasized the private and voluntary character of the Kaiser plan.

While the affirmative action program employed by the City of Seattle is voluntary, it was created by and continues to be administered by a public rather than a private employer and thus the holding in Weber is of limited use in our evaluation of the instant program. However, certain differences between the plan in issue in Weber and that challenged here highlight the basis for our holding that actual victimization is not a prerequisite to

selective certification of a particular employee even when accomplished by a public employer.

Unlike the affirmative action program in Weber, the program challenged here does not involve a quota. As we mentioned above, the purpose of selective certification is to create an alternative procedure to that established by Article 16 of the City Charter. This selective procedure simply allows eligible minorities, not within the top ranks of the eligibility register, to be considered for advancement. The use of selective certification neither guarantees the promotion of any particular individual nor absolutely assures that a certain numerical goal of minority representation will be reached. This clearly is not a quota.[13]

In finding Kaiser's affirmative action plan a permissible racial preference, the Weber court

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[13] In Lindsay v. Seattle, 86 Wn.2d 298, 548 P.2d 320 (1976) this court referred to the affirmative action policies of Seattle's Department of Engineering as involving temporary quotas. However, the Engineering Department, at the time of the challenged appointment, employed an affirmative action program that involved not only selective certification but also a policy of filling the first of every three vacancies "with appropriate minorities." Lindsay, 86 Wn.2d at 711. This court correctly characterized that combined system as a temporary quota although we were careful to note that the case did not involve an absolute quota. Id. at 711. It was the policy of filling one out of every three vacancies with a minority employee and not the selective certification procedure which caused the affirmative action program challenged in Lindsay to be characterized as a temporary quota, however.

We are not prepared at this time to determine if the system employed in Lindsay, whether denominated as a goal, preference or temporary quota, would be

emphasized that the plan did not "unnecessarily trammel" the interests of white employees, require the discharge of white workers, or create an absolute bar to the advancement of white employees. United Steelworkers of America v. Weber, supra, slip opinion at 12-13. The same is true of Seattle's selective certification procedures. Whether or not a selective certification is requested, the top five persons on the eligibility register or the top 25 percent of the register are certified under regular procedures. A request for selective certification therefore does not cause anyone otherwise eligiblie to lose their eligibility and appellants do not so contend. Selective certification simply increases the number of candidates, it does not replace non-minority candidates with minority candidates and appellants do not claim otherwise. The selection from among the total number of candidates is ultimately a discretionary decision of the department head. Therefore, while appellants here had a reasonable expectation of being certified, that expectation was not affected by the presence of selectively certified candidates. While appellants had a reasonable expectation of being certified, they cannot be said to have had a justified expectation of receiving an actual appointment to the position for which they were certified. Thus, the use of selective certification does not cause existing employees to be displaced, call for the firing or promotion of unqualified persons, or create an absolute preference for minorities to the exclusion of non-minorties.

Footnote [13] continued.
valid or invalid in light of subsequent federal decisions. Whether an affirmative action program like that in Lindsay, imposing a temporary quota to correct past discrimination and also designed to attain racial balance of work force, would be valid was not considered in Lindsay. Further, that issue is not before us in the instant case. The resolution of that issue must await another day.

Under the circumstances of this case and in light of the proof of past and continuing discriminatory practices by both the City and the Fire Department, we hold that proof of actual personal victimization of a minority employee is not a prerequisite to the application of affirmative relief in the form of selective certification.[14] It is sufficient that those benefitted by selective certification are within a class of persons identified by Rule 7.03j as likely to have been the victims of discrimination. Our holding is consistent with a number of cases declining to require proof of specific acts of discrimination against each beneficiary of affirmative action. Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977); Equal Employment Opportunity Comm'n v. American Tel. & Tel. Co., 556 F.2d 167 (3rd Cir. 1977); Barnett v. W. T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971).

The trial court is affirmed on this issue.

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[14] We note with considerable interest the extent to which the United States Supreme Court was willing to go to permit the use of prior discrimination and thus avoid the need to prove actual personal victimization of a member of a minority race. See United Steelworkers of America v. Weber, ___ U.S. ____, L. Ed. 2d ___, ____ S. Ct. ____, slip opinion, page 2, note 1 (1979):

"[1] Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice. See, e.g., United States v. International Union of Elevator Constructors, 538 F.2d 1012 (CA3 1976); Associated General Contractors of Massachusetts v. Alshuler, 490 F.2d 9 (CA1 1973); Southern Illinois Builders Association v. Ogilve, 471 F.2d 680 (CA7 1972); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (CA3

IV
SELECTIVE CERTIFICATION USE VALID

Finally, appellants challenge the individual certifications of Harris and Taylor. It is contended the procedures employed in certifying them for their respective positions did not meet the requirements of Rule 7.03j.

Appellants claim the appointment of Harris was ineffective because the Fire Chief did not initially request selective certification to fill the available Fire Battalion Chief positions. The trial court concluded that the Chief's ultimate appointment of Harris was effective and cured any claimed defect in the certification. (Conclusion of Law 10.) We agree. The record indicates the Fire Chief knew he had discretion to appoint from among all persons certified for the Battalion Chief position. The mere fact that one of the candidates had been selectively certified did not limit that

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Footnote [14] continued.
1971); Local 53 of International Association of Heat & Frost, etc. v. Vogler, 407 F.2d 1047 (CA5 1969); Buckner v. Goodyear, 339 F. Supp. 1108 (ND Ala. 1972), aff'd without opinion, 476 F.2d 1287 (CA5 1973). See also United States Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions 58-94 (1976), (summarizing judicial findings of discrimination by craft unions); G. Myrdal, An American Dilemma (1944) 1079-1124; R. Marshall and V. Briggs, The Negro and Apprenticeship (1967); S. Spero and A. Harris, The Black Worker (1931); United States Commission on Civil Rights, Employment 97 (1961), State Advisiory Committee, United States Commission on Civil Rights, 50 States Report 209 (1961); Marshall, 'The Negro in Southern Unions,' in The Negro and the American Labor Movement (ed. Jacobson, Anchor 1968) p. 145; App., 63, 104."

Whether we would be willing to extend "judicial

discretion. Knowing that, he exercised his discretion by appointing Harris and two other candidates thereby ratifying the selective certification. National Bank of Commerce v. Thomsen, 80 Wn.2d 406, 495 P.2d 332 (1972). Therefore, although the procedure used did not specifically follow that defined in Rule 7.03j, the Chief's subsequent appointment of Harris to the position of Fire Battalion Chief cured the earlier procedural defect.

Appellants similarly challenge the selective certification of Taylor for failing to specify reasons for the request, as required by Rule 7.03j. Contrary to appellants' contention, the selective certification request filed by the Fire Chief for the position of Fire Lieutenant indicates both that selective certification was needed to achieve adequate representation of minorities and that only 7 out of 120 Fire Lieutenants at that time were minorities. The request met the requirements of Rule 7.03j. The appointments of Harris and Taylor were valid.

The trial court is affirmed.

/s/

We concur:

Footnote [14] continued.
notice" to such an extent need not be answered at this time. The question of prior discrimination has been established by actual proof.

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I concur in the opinion solely on the basis of the authority of Lindsay v. Seattle, 86 Wn.2d 698, 548 P.2d 320 (1976).

/s/ _____